

**TITLE OF REPORT:** Proposed S102 Modification Order – Bank Top, Swalwell Bank, Whickham.

**REPORT OF:** Anneliese Hutchinson, Service Director, Development, Transport and Public Protection

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## **1.0 Purpose of the Report**

- 1.1 To seek the authority of the Committee to make an order under section 102 of the Town and Country Planning Act 1990 requiring the alteration of an existing unfinished house which was granted planning permission in 1998 on the site known as Bank Top, Swalwell Bank, Whickham.

## **2.0 Background**

- 2.1 On the 5 March 1998 the Council received a planning application (reference : 208/98) for the erection of a detached house on the site known as Bank Top, Swalwell Bank, Whickham. Copy of site location plan attached as Appendix 2.
- 2.2 The detached house was designed to take into account the sloping nature of the site and the views available to the west and north. This resulted in a part two, part three storey building with a large footprint, including projecting windows on the third floor of the building on the western and northern elevations. The planning application was considered by the then Development Control Panel and was granted planning permission, subject to planning conditions by the Council on 30 April 1998.
- 2.3 Development on the site commenced in January 2003, resulting in the laying of foundations. Development then subsequently ceased on site. Work began again in April 2004. At the beginning of 2005 the building had reached eaves height, and roof trusses had been added. As the overall height, mass and potential for overlooking into neighbouring properties gardens houses became apparent, the Council received a number of complaints. Council officers visited the site in April 2005 to assess the impact of the building.
- 2.4 Council officers were of the opinion that the height and mass of the building, coupled with the overlooking from some of the windows of the house would lead to an unacceptable impact on the adjacent single storey bungalows along Parkdale Rise and Heathwood Avenue.
- 2.5 The Council asked the applicant to stop works on 7 April 2005, which the applicant did. The house has therefore stood unfinished since 2005.

- 2.6 Since 2005 Council officers have attempted to resolve these issues amicably through a revised planning application rather than serve a formal section 102 notice to alter the building. Planning and Development Committee were minded to grant a revised planning application (reference : DC/08/01266/FUL) in 2010 subject to a section 106 agreement being signed to ensure the original planning permission could not be completed. This revised planning permission has not been granted.
- 2.7 As the development is being built in accordance with the approved plans, it is not appropriate for the Council to use normal enforcement powers. Rather it is recommended that the Committee resolves to use powers under section 102 of the Town and Country Planning Act to require the alteration of the building.
- 2.8 Counsel's advice has been sought and it is considered expedient to use the powers under section 102 on the grounds that it is in the interests of the proper planning of the area that the unfinished building should be altered.
- 2.9 It should be noted that if Committee agree to serve a section 102 notice, the landowner would be entitled to seek compensation under the Town and Country Planning Act 1990.

### **3.0 Timeline of Events – Key dates**

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| April 1998 | The Council granted planning permission 208/98 for a new house on the site.  |
| Jan 2003   | Works start on site with the foundations then stop.  |
| April 2004 | Works restart on the site.   |
| April 2005 | Council receives complaints about the impact of the house on neighbours. Council officers conclude that although the landowner is building in accordance with the approved plans the house has an unacceptable impact on neighbours. Council ask landowner to stop works on the house. Building works stop.  |
| June 2005  | At the Council's Development Control Panel on 22 June 2005 Members authorised the making of an order under section 102 of the Town and Country Planning Act 1990 to require the landowner to make alterations to the house by the removal of the third storey or such other terms appropriate in the circumstances. Councillors agreed that, whatever action was necessary to resolve the situation should be pursued and because a section 102 notice can take time an informal solution should also be explored. |
| Aug 2008   | A new planning application DC/08/01266/FUL was submitted for a revised design for the house to overcome the concerns with the approved scheme under permission 208/98.   |
| June 2010  | Planning and Development Committee resolved to grant planning permission for the new planning application DC/08/01266/FUL subject to a section 106 agreement being signed to ensure the original   |

planning permission could not be completed. The S106 agreement has not been signed so the decision has not been issued to-date.

Discussions have been ongoing since. Nonetheless the issue of the unacceptable impact of the house remains unresolved.

#### **4.0 Impact of Bank Top House**

- 4.1 The house in its current form is considered to have an unacceptable impact on the living conditions of the immediate neighbours to the north and west of the site, along Heathwood Avenue and Parkdale Rise.
- 4.2 The height and mass of the existing house is considered to have an overbearing impact, dominating the rear elevations and rear garden areas of these residential properties. The overbearing impact is also due to the fact that the residential properties are single storey bungalows, which are at a lower level than the Bank Top site and have shallow rear gardens.
- 4.3 It is also considered that there is potential for overlooking to occur from some of the windows in the Bank Top house to the adjacent bungalows to the north and west of the site.

#### **5.0 Section 102 Legislation**

- 5.1 Under section 102 of the Town and Country Planning Act 1990 the Council may make an order requiring the alterations of a building on the grounds that it is expedient in the interests of proper planning of the area (including the interests of amenity). An order under this section may grant planning permission for any development of the land to which the order relates, subject to such conditions as may be specified in the order.
- 5.2 An order made under section 102 can therefore require specific steps to be taken for the alteration of the building and may also grant conditional planning permission for the development of the land. In considering whether to make such an order the Council must have regard to the development plan and any other material consideration.
- 5.3 An order made by the Council under section 102 would not take effect until confirmed by the Secretary of State, either without modification or subject to modifications as the Secretary of State considers expedient. The Secretary of State may allow interested parties (the landowner and any person affected by the order) to be heard by a planning inspector (in a hearing or public inquiry).
- 5.4 Should the order be confirmed by the Secretary of State, the landowner can seek compensation payable by the Council. Compensation is payable only if and when an appropriate claim is made within a 12 month period after the order is confirmed.
- 5.5 The Committee should note that the exercise of the Council's powers under section 102 is a serious matter and is a measure only to be taken as a last resort to remedy harmful planning issues. If an order were to be confirmed, it would involve depriving

the landowner of the benefit of the planning permission which they lawfully applied for and was granted in 1998.

- 5.6 It is important that Committee note that an order under section 102 should not be made when there is merely a difference of professional opinion between the officers who dealt with the application at the time and those considering the development today. Nor should it be used to remedy every poor planning decision. Such an order should be made in exceptional circumstances and only when there is a clear case that it is expedient to do so in the interests of the proper planning of the area.

## **6.0 Proposed Changes To Bank Top**

- 6.1 Council officers have been in discussions with the landowner regarding a revised scheme for the unfinished house, considering which alterations might make it acceptable. This is in large part based on the previous planning application (reference : DC/08/01266/FUL), which Planning and Development Committee were minded to grant in 2010. The landowner is keen to continue and finish the house in line with the proposed elevational drawings (drawing reference : 3043.01 122 A and 3043.01 123 A) attached as Appendix 3.

- 6.2 Authorisation is therefore being sought to serve a section 102 notice which would require alterations to be made to the existing unfinished house as shown on the attached elevational drawings, as well as requiring tree planting/landscaping to be undertaken along the northern and western boundaries of the site.

- 6.3 The changes on the elevational drawings include :

- Removing the pitched roof and replacing it with a flat roof
- Installing obscure glazing and stained glass to a number of the windows on the northern and western elevations of the house

### **6.4 Roof Alterations**

- 6.5 The attached plans show the removal of the existing pitched roof and replacing it with a flat roof with a deep eaves overhang. This will create a three storey flat roofed house rather than the existing three storey house with a pitched roof. The overall ridge height of the existing house with a pitched roof is 11 metres. The height of the house with the proposed flat roof design will measure around 8.1 metres high. The proposed roof alteration will therefore reduce the height of the existing house by 2.9 metres. The proposed elevational drawings show 3 features on the flat roof which include two glass lantern features to let light into the house and an external enclosure for the workings of an internal lift.

### **6.6 Window Alterations**

- 6.7 The attached plans show a number of window alterations. These include the installation of obscure glazing to some of the windows in the north and west elevations of the house (these windows are coloured dark grey on the attached

elevation drawings) as well as the use of stained glass for one section of glazing in the west elevation of the house which faces the bungalows along Parkdale Rise.

## 6.8 Landscaping / Tree Planting

- 6.9 The attached elevation drawings do not show the garden of the surrounding house. It is considered that the section 102 notice should also require tree planting / landscaping along the northern and western boundaries of the site, adjacent to the rear gardens of the bungalows along Parkdale Rise and Heathwood Avenue. This additional landscaping is considered to be necessary to provide the bungalows to the north and west of the site with an attractive and varied outlook, which would help to break up and soften the view of the house when seen from the adjacent bungalows, as well as provide an element of screening.
- 6.10 This additional tree planting/ landscaping is considered to be an important element of the proposed changes as concerns regarding the 1998 permission include impact on outlook due to the scale and mass of the house. Suitable landscaping would therefore help to soften and mitigate the visual impact of the house, without forming a further solid block to the outlook of the adjacent properties. Any new landscaping would however need to ensure that the species, number, size and location of the planting would not result in additional adverse impact on the neighbouring properties with regards to shading or visual dominance.
- 6.11 With this in mind it is considered that the landscaping scheme for the site should at the very least include 3 groups of semi mature Himalayan Birch along the northern and western boundary of the site, spaced out and staggered (not in a formal line) planted at least 3 metres from the site boundary if possible.
- 6.12 The landowner is currently preparing a landscaping scheme for the site. If this is received before the Planning And Development Committee meeting an update will be provided at the meeting. If a landscaping scheme has not been submitted before the Planning and Development Committee meeting it is considered appropriate to seek authority from Committee that landscaping is provide along the northern and western boundaries of the site in line with the scheme of Himalayan Birch outlined in section 6.11 above or an appropriate alternative scheme in the circumstances.

## 7.0 **Publicity / Representations**

- 7.1 On 23rd January 2020 the Council provided information on its website, facebook page and twitter feed about Bank Top and of the Council's intention to seek Committee's authorisation to serve a section 102 notice to make alterations to the house. On the 24<sup>th</sup> January 2020 the Council also sent over 70 information letters to surrounding properties.
- 7.2 At the end of January 2020 Council officers also briefed the local MP (Liz Twist) as well as the 3 local ward councillors for Wickham North.
- 7.3 11 local residents from Parkdale Rise and Heathwood Avenue have signed and submitted written comments to the Council on 4 February 2020 providing their views on the possible section 102 notice.

7.4 The comments stated that the Bank Top property has had an unacceptable impact on the living conditions of residents living on Heathwood Avenue and Parkdale Rise for the following reasons :

- The site and unfinished building has been in a neglected and ruinous state for at least the past 14 years. During this time there have been numerous environmental and health and safety issues. These include the property being set on fire several times, biological hazards – pigeons accessing and nesting within the rooms of the third storey, complaints by local residents regarding rats, fly tipping and overgrown grass.
- The proposed redesign is a revamp of the 2010 proposals and does nothing to address resident concerns regarding :

Design is out of character and not in keeping with other properties.

The height and mass has an overbearing and dominating effect within the surrounding area as it overlooks adjacent single storey bungalows on both Parkdale Rise and Heathwood Avenue. Many of the bungalows are at a lower level meaning it is invasive to residents privacy.

The lack of a clear Council boundary policy at the time meant that some of the bungalows (on the west side of the site on Parkdale Rise) are further impacted by the height, mass and close proximity of the building.

It blocks natural light and in the winter months casts many of the bungalows rear elevations including gardens in complete shade.

The people that signed the letter state that as long suffering residents they are of the opinion that the section 102 notice should be served and that the Secretary of State should allow residents views to be heard.

## **8.0 Assessment of Attached Elevational Drawings**

8.1 The main planning considerations for any changes to the existing house are whether the proposed alterations are acceptable in terms of the impact on the appearance of the house and the street scene and the impact on the living conditions of surrounding residents.

### **8.2 Principle**

8.3 The principle of residential development on the site is not in dispute, as the residential development of the site was previously considered acceptable as part of the previously approved planning application 208/98. The principle of residential development on the site is still considered to be acceptable to-date given that the site is situated within a residential area, close to Whickham local centre.

#### 8.4 Visual Appearance

- 8.5 The existing unfinished house occupies an elevated position, in a prominent location in the street scene along Swalwell Bank. However it is considered that due to the position of the house within the site (which is set at least 20 metres back from the eastern boundary of the site along Swalwell Bank) and the use of projecting architectural forms, detailing and different materials, this helps to break up the overall mass of the building when viewed from Swalwell Bank. The site is a substantial one in size and can accommodate a large house of this type.
- 8.6 The proposed alterations to the design of the house will result in a more contemporary, modern looking house. Concerns have been raised by local residents that the house would be out of character with the area. It is however considered that a modern design does not always equate with visual harm and it is necessary to look at the relationship between the house and its setting. The surrounding area is residential in character, but is not uniform in character. The street scene along Swalwell Bank and the area surrounding the site has a varied residential character in terms of size, type, style, design and materials used in the properties including bungalows, semi detached houses, terrace housing and a contemporary care home to the south of the site.
- 8.7 Therefore whilst the changes to the house would result in a modern design for the Bank Top property, it is considered that this would not cause any harm to the visual appearance or character of the street scene along Swalwell Bank, given that the character of the area is already mixed. In addition the completion of the unfinished house would also improve the appearance of the area.
- 8.8 The proposed changes to the house as shown on the attached elevational drawings are therefore considered to be acceptable from a design point of view and accords with the aims and objectives of the NPPF, saved policy ENV3 of the Council's Unitary Development Plan (UDP) and policy CS15 of the Council's Core Strategy and Urban Core Plan (CSUCP).

#### 8.9 Residential Amenity

##### 8.10 Overbearing Impact

- The position of the house on the site and the size of its footprint would remain the same. The removal of the existing pitched roof will reduce the height of the house by 2.9 metres and will therefore reduce the overall height and mass of the house when viewed from the surrounding area, especially when viewed from the neighbouring bungalows to the north and west of the site.
- 8.11 It is considered that a landscaping scheme along the northern and western boundaries of the site would also help to soften and break up the view of the house when viewed from the neighbouring bungalows to the north and west.
- 8.12 It is therefore considered that the removal of the pitched roof together with the introduction of a landscaping scheme would significantly alter and substantially improve the impact the Bank Top house has on the neighbouring bungalows to the north and west of the site with regards to overbearing impact and outlook. Elements of the existing house would still be visible from some of the surrounding properties, but not to such a significant impact.

8.13 Overlooking

The attached plans show a number of window alterations. These include the installation of obscure glazing to some of the windows in the north and west elevations of the house (these windows are coloured dark grey on the attached elevational drawings attached as Appendix 3) as well as the use of stained glass for one section of glazing in the west elevation of the house which faces the bungalows along Parkdale Rise.

8.14 Council officers have been inside the Bank Top house and visited a number of the bungalows along Heathwood Avenue and Parkdale Rise. From these site visits it is considered that the proposed obscure glazing as shown on the attached drawings would address the potential for overlooking to occur.

8.15 With regards to the stained glass section proposed on the west elevation of the house it is considered necessary to have the details of the stained glass (its colour and design) to ensure that these windows do not allow any overlooking of the adjacent bungalows along Parkdale Rise. Given that the details of the stained glass are not provided on the proposed elevational drawings this is a detail that would need to be conditioned.

8.16 In addition it is also considered that the introduction of a landscaping scheme along the northern and western boundaries of the site would also help to reduce the direct line of sight and therefore the potential for overlooking between the house and the neighbouring properties.

8.17 It is considered that there is sufficient distance between the other (non obscurely glazed and non stained glass) windows in the Bank Top house and all the surrounding properties, including the care home to the south, so as to not create an unacceptable degree of overlooking between the properties.

8.18 Loss of light / overshadowing

Concerns have been raised by local residents that the existing Bank Top house results in loss of light and overshadowing to the adjacent bungalows to the north and west of the site along Heathwood Avenue and Parkdale Rise.

8.19 The Bank Top house is positioned between 12 – 20 metres away from the site boundaries. Most of the distances between the Bank Top house and the neighbouring properties meet or exceed the Council's guidelines for separation distances (these guidelines being referred to in guidance for house extensions but where the principles remain the same), which are normally 21 metres window to window (un-obscurely glazed) or 13 metres window to blank wall, or obscurely glazed windows.

8.20 Given the distances between the Bank Top house and the neighbouring properties, it is considered that any loss of light or overshadowing that results from the Bank Top house would not be of such a significant level, to make it unacceptable from a planning point of view. In addition, any loss of light or overshadowing that neighbouring properties currently experience from the Bank Top house would be improved by the reduction in the overall height of the building proposed by removing the existing pitched roof.

- 8.21 The proposed changes to the house as shown on the attached elevational drawings are therefore considered to be acceptable from a residential amenity point of view (subject to the details of the stained glass window being approved) and accord with the aims and objectives of the NPPF, saved policy DC2 of the UDP and policy CS14 of the CSUCP.
- 8.22 Highway Safety
- 8.23 There is an existing vehicle access to the site off Swalwell Bank, which will be retained and used. It is considered that the use of this existing vehicle access for one dwelling is acceptable from a highway safety point of view.
- 8.24 There are two garage doors in the northern elevation of the house which lead to a void under the houses which can be used for parking cars and cycle parking. It is therefore considered that there is adequate off street car parking space and cycle parking space for one house on the site. The proposed changes to the house as shown on the attached elevational drawings are therefore considered to be acceptable from a highway safety point of view and accord with the aims and objectives of the NPPF and policy CS13 of the CSUCP.
- 8.25 This matter has been given full and careful consideration, including all relevant planning issues as required under section 102. It is considered appropriate to seek an order requiring the landowner to make alterations to the existing unfinished house as shown on the attached elevational drawings in Appendix 3 along with landscaping along the northern and western boundaries of the site. It is considered that the alterations proposed including the landscaping would mitigate the loss of privacy and the overbearing impact on the adjoining bungalows.

## **9.0 Conclusion**

- 9.1 This is a longstanding matter with considerable local interest. As the development is being built in accordance with the approved plans, it is not appropriate for the Council to use normal enforcement powers. Section 102 of the Town and Country Planning Act 1990 is a very little used piece of legislation but is considered to be the most appropriate way to bring this longstanding issue to a close. The principle of residential development on the site is not in dispute, however it is considered that the development as granted under planning application 208/98 is harmful to the living conditions of the neighbouring bungalows. The authority of the Committee is therefore being sought to make an order under section 102 of the Town and Country Planning Act 1990 requiring the alteration of the existing unfinished house and to use its powers under section 102 to remedy the situation.
- 9.2 The elevational drawings attached at Appendix 3 along with a landscaping scheme for the northern and western boundaries of the site, would be the specific scheme required to be undertaken, subject to confirmation by the Secretary of State. These drawings are based on the 2008 planning application (reference : DC/08/01266/FUL) which Planning and Development Committee were minded to grant in 2010 and have been agreed with the landowner. This process would therefore hopefully enable the landowner to develop a home that is acceptable to both their family and the neighbours.

## **10.0 Recommendations**

10.1 The Committee is requested to authorise the Director of Communities and Environment and in consultation with the Director of Corporate Services and Governance and the Director of Corporate Resources :

- To make and serve an order under section 102 of the Town and Country Planning Act 1990 requiring the alteration of the building to a specific scheme as shown on the attached elevational drawings (reference : 3043.01 122 A and 3043.01 123 A) and to require tree planting/landscaping along the northern and western boundaries of the site.
  
- To submit the order to the Secretary of State for confirmation

**1. FINANCIAL IMPLICATIONS**

If Committee agree to serve a section 102 notice, and should the order be confirmed by the Secretary of State, the landowner would be entitled to seek compensation payable by the Council under the Town and Country Planning Act 1990.

The Council holds insurance policies that provide cover in the event of a claim for compensation arising from the making and confirmation of an order under section 102 of the Town and Country Planning Act 1990. It is likely that a claim for compensation will be sought and any such claim will be passed to the Council's insurers who will be responsible for determining its outcome.

**2. RISK MANAGEMENT IMPLICATIONS**

Nil.

**3. HUMAN RESOURCES IMPLICATIONS**

Nil

**4. EQUALITY AND DIVERSITY IMPLICATIONS**

Nil

**5. CRIME AND DISORDER IMPLICATIONS**

Nil

**6. SUSTAINABILITY IMPLICATIONS**

Nil.

**7. HUMAN RIGHTS IMPLICATIONS**

The subject matter of the report touches upon three human rights issues:

- The right to peaceful enjoyment of property (Article 1 of Protocol 1)
- The right of an individual to a fair trial (Article 6)
- The right to private and family life and home (Article 8)

As far as Article 6 is concerned the section 102 regime is outside of the Council's control being administered and confirmed by the Secretary of State and/or The Planning Inspectorate.

With regards to the First Protocol: Article 1 and Article 8 – the operation of planning law represents an interference with the right of every person to the peaceful enjoyment of his/her possessions and their home. Such interference is deemed necessary to control the use of land in the public interest. The rights of the individual have to be balanced against the interests of the wider community

**8. WARD IMPLICATIONS**

Whickham North

**9. BACKGROUND INFORMATION**

Appendix 2 – site location plan

Appendix 3 – proposed elevational drawings